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C O N F I D E N T I A L SECTION 01 OF 04 HONG KONG 001775

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STATE FOR EAP/CM

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TAGS: [ECON](#) [EFIN](#) [EINV](#) [ETRD](#) [HK](#) [CH](#)
SUBJECT: HONG KONG SEEKS TO MODERNIZE COPYRIGHT ORDINANCE

Classified By: Deputy Principal Officer Christopher Marut for reasons 1
.4 (b) and (d).

11. (C) Summary: The HKG recently closed its written public comment period on several proposals to modernize and strengthen Hong Kong's Copyright Ordinance (CO). The proposed amendments largely concern the digital transmission of copyrighted materials, especially via the Internet. Many Internet service providers, content users and content providers (and their various representative groups) provided written comments to the HKG by the August 31 deadline. Several major content provider representatives supplied their written comments to us, as well. While content providers support the HKG's efforts to improve the CO's effectiveness in reducing IPR infringements, they seek to tighten almost all of the HKG's proposals to better protect copyrighted materials from illegal distribution. End summary.

12. (C) Comment: Content provider representatives told EconOff they are generally pleased with the HKG's efforts to investigate, arrest, and prosecute IPR infringers. Content providers support the HKG's efforts to modernize its CO to cover digital transmission of copyright infringing materials, while better synchronizing Hong Kong's legal framework with those of Hong Kong's largest trading partners. Despite the written objections from content providers about specific aspects of the HKG's proposed amendments to the CO, we believe the HKG is making a good-faith effort to balance a number of competing interests. These include protection of personal data privacy, encouragement of HK's development as an Internet service provider (ISP) hub, and maintenance of a business environment conducive to creative industry. The HKG's ultimate amendments to the CO -- expected to be enacted into law by summer 2009 -- will not entirely please any of the three primary interest groups affected by the CO (i.e. ISPs, content providers, and content users). However, the amendments will both modernize the CO and better synchronize it with similar statutes enacted by Hong Kong's major trading partners. The final legislation should clarify the legal framework that governs the electronic conversion and distribution of copyrighted materials by all concerned parties. End comment.

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HKG Collects Public Comments on Proposed CO Amendments
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13. (U) In December 2006, the HKG's Commerce and Economic Development Bureau (CEDB) solicited public suggestions about the best means by which to strengthen Hong Kong's CO. The public consultation period ended in April 2007, with the CEDB receiving over 600 submissions from individual content users, copyright owners (including several intellectual property industry groups) and ISPs. Based on this feedback, in April 2008 the CEDB presented seven preliminary proposals to strengthen the CO. The CEDB requested public comments on

their proposals by August 31, 2008, with an eye toward introducing legislative amendments to the CO by summer 2009. In formulating its proposals, the CEDB attempted to better synchronize its IPR protection framework with those of Hong Kong's major trading partners, including the United States, UK, Singapore, Australia, and Korea.

¶4. (C) Four leading, globally active intellectual property representative organizations gave us their individual written comments, as submitted to the CEDB in August 2008. The Hong Kong offices of the four entities -- the American Chamber of Commerce (AmCham), the International Federation of the Phonographic Industry (IFPI), the Motion Picture Association (MPA), and the Entertainment Software Association (ESA) -- praised the HKG for its efforts to strengthen IPR protection and enforcement, and improve the compatibility of the CO with the IPR statutes of HK's largest trading partners. However, the four industry organizations (hereafter collectively referred to as the "content provider representatives") sought material modifications to most of the CEDB's proposals.

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Broader IPR Protection; Criminal Penalties
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¶5. (U) The CEDB proposals would broaden copyright protection to cover all modes of electronic transmission. The desire to make HK's copyright statutes "technology neutral" stems from the rapid evolution of the means of electronic transmission. All future electronic methods of transmission would become automatically covered under the revised intellectual property right (IPR) protection framework.

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¶6. (SBU) In addition, the CEDB proposes to enact criminal sanctions for electronic distribution of copyrighted materials (as opposed to the current civil penalty regime), whenever the infringing activity is done either for profit or in the ordinary course of business. (Note: Other IPR infringement activities already carry criminal penalties. Several new amendments to the CO came into effect on July 11, 2008, including a provision to hold company directors and partners criminally liable for using pirated software, even if the company officers were unaware of the software's use. Company officials were encouraged to implement procedures to ensure that only licensed software was installed on company computers, and to educate managers and staff about the importance of using only properly licensed software. HK's chief IPR enforcement official, Ben Ho from the Customs and Excise Department (CED), told EconOff on August 28 that such preventative measures by a company could be used under the law to exculpate accused company officers, if the CED found pirated software on a company's computers. End note.) The new criminal penalties for electronic transmission of copyrighted materials would also apply, even if the infringer is not motivated by financial gain. In such not-for-profit cases, however, the CEDB proposes to limit criminal penalties to those involved with illegally "streaming" copyrighted content over the Internet (i.e. content that is consumed by the end user but not stored by the user for future use or sharing).

¶7. (C) The CEDB explicitly stated it does not wish to criminalize unauthorized downloading and peer-to-peer (P2P) file-sharing activities. Users of copyrighted materials agreed with the CEDB, pointing out that infringing material on the Internet is difficult to distinguish from legally authorized content, and that several of HK's major trading partners (e.g. Australia, Canada and the UK) have not criminalized downloading of copyrighted materials. Content provider representatives, on the other hand, expressed disappointment. They requested the CEDB to criminalize all downloading and P2P infringements that are intentional and committed for financial gain, and/or whenever they occur on a commercial scale.

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Allow ISPs to "Cache" Copyrighted Materials

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¶18. (U) The CEDB proposes to introduce an exemption for temporary storage of copyrighted works by ISPs. The CO currently prohibits this activity that enables ISPs to shorten the download times of copyrighted works, whenever a user requests them through the Internet. To ensure the HKG's compliance with the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the CEDB proposes that the exemption be limited as follows: it will apply only to communication of works that are not infringing; it will be subject to express prohibitions imposed by copyright owners on the use of their materials; and the ISP will not be permitted to modify the content contained in the original version during the reproduction process.

¶19. (C) While ISPs generally support the proposal, claiming it will clarify their legal position, enable them to save bandwidth, and speed transmission of user-requested content, content provider representatives feel this amendment to the CO is unnecessary. AmCham members, for example, prefer instead a limitation of liability regime for ISPs based on that enacted under the U.S. Digital Millennium Copyright Act of 1998 (DCMA). A central feature of the DCMA is its "notice and takedown" procedure, through which content providers are provided with a quick and inexpensive method of ensuring that infringing material is taken down. Under this mechanism, ISPs enjoy the benefits of immunity for acting on takedown notices in good faith, as well as limited liability in respect of their customers' infringements. In its written comments to the CEDB, AmCham stated that such a limitation of liability approach to address the issue of caching by ISPs would also be consistent with legislation enacted in Australia, New Zealand and Singapore.

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Voluntary Code of Practice for ISPs

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¶10. (U) The CEDB wishes to avoid "unnecessary regulation" of ISPs. It has therefore established a tripartite forum composed of representatives from ISPs, copyright owners and

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content users to establish a voluntary code of practice for ISPs. To provide incentives for ISPs to comply with the code of practice, the CEDB proposes to amend the CO to make compliance with the voluntary code a factor to be considered by the court, when determining whether an ISP has authorized an infringement committed on its service platform.

¶11. (SBU) Content provider representatives prefer enactment of a limited liability legal framework that clearly outlines the kinds of steps that an ISP would be obliged to take, in order to qualify for a limited safe harbor. They state that enactment of legal provisions, as opposed to the CEDB's proposed voluntary code of practice, would set the basic foundations upon which voluntary efforts could flourish. In addition, they point out that Australia, Singapore, New Zealand and the PRC have all dismissed voluntary codes of conduct in favor of legislated limitation of liability frameworks.

¶12. (C) EconOff obtained the minutes from the first tripartite forum meeting held on July 16, 2008. A senior CEDB official who chaired the meeting stated that the forum should be used to draft a voluntary code of practice for ISPs by March-June 2009, in order to "tie in with the legislative timetable" for the broader proposals to amend the CO. He also explained that the HKG intends to make the ultimately agreed upon voluntary code of conduct legally binding on all ISPs, regardless of whether they participated in the

tripartite forum. A second meeting of the tripartite forum was to be convened in early October 2008.

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Continued Reliance on "Norwich Pharmacal"
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¶13. (SBU) The CEDB proposes to continue its reliance on "Norwich Pharmacal" procedures to identify infringers. Under this mechanism, copyright owners must obtain a court order that forces an ISP to disclose the identity of a user who is believed to have committed a copyright infringement. Content providers in HK claim that a Norwich Pharmacal proceeding is slow and costly, and few copyright owners have sought to rely on it. They informed the CEDB that they prefer introduction of a U.S.-style system, whereby a copyright owner can request a court clerk to issue a subpoena to an ISP that requires the ISP to identify an alleged infringer with no court scrutiny. Although this is relatively cheap and simple, compared to the current framework, the CEDB and the HKG's Privacy Commissioner for Personal Data believe such a system could invade users' data privacy. The CEDB stated, "We are yet to be convinced that the difficulties experienced (by content providers) are such as to warrant putting in place an alternative infringer identity disclosure mechanism that bypasses judicial scrutiny." The CEDB said it "stands ready to explore other ways" to facilitate the copyright owners in taking civil actions against online infringements.

¶14. (C) The CEO of the International Federation of the Phonographic Industry in Hong Kong, Ricky Fung, told Econoff on August 28 that continued reliance on Norwich Pharmacal procedures represents "an impossible situation." He said sales of music recordings in Hong Kong have declined from US\$ 346 million (HK\$ 2.7 billion) in 1989 to only US\$ 51 million (HK\$ 400 million) in 2007. Fung believes the CEDB's proposals to strengthen Hong Kong's CO "will not help the record industry here."

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No Introduction of Statutory Damages
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¶15. (SBU) Under the current CO, a copyright owner may receive only compensatory damages for losses suffered through copyright infringement. A plaintiff must prove his losses to the court. This has often resulted in small damage awards, due to the plaintiff's inability to prove the full extent of his losses. Content provider representatives point out that other jurisdictions such as the PRC, United States, Canada and Singapore have enacted statutory damages in their copyright legislation. They say the introduction of statutory damages would have a greater deterrent effect on potential infringers, who would know their likely (material) liability. Significant statutory damages would also encourage infringers to settle at an earlier stage in court proceedings. The HKG is not prepared to introduce statutory damages for copyright infringement, stating such action "could have far-reaching implications" on other civil proceedings that have no provisions for statutory damages.

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The CEDB also pointed out that the UK and Australia have no provisions for statutory damages.

¶16. (U) The CEDB instead proposes to identify three factors which will help a court reach a fair assessment of the relevant damages to be awarded in each case: the conduct of the defendant after the act constituting infringement (e.g. attempts to hide or disguise infringements or to take other action prejudicial to the copyright owner); the possible widespread circulation of the infringing copy via digital transmission in the case of Internet piracy; and the need to deter similar copyright infringements.

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Allow Limited Copying for Personal and Private Use
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¶17. (SBU) The CEDB proposes to create an exception in the CO that would allow owners of "certain types" (unspecified by CEDB) of copyrighted materials to make a copy for personal and private use. This often involves "media shifting" (e.g. copying material from one type of source, such as a compact disc, onto another media type such as an IPOD). The CEDB noted that copyright legislation in Australia permits such use, and similar legislative proposal is under review by New Zealand's parliament. The HKG says it will ensure that any such exceptions would be TRIPS-compliant and subject to pre-conditions, such as ownership of a legitimate copy, limits on the permitted number of copies, and restrictions on file-sharing. Not surprisingly, Hong Kong's content provider representatives oppose this CEDB proposal, stating that such an exception would be open to abuse. They point out that such exceptions in Australia and New Zealand only apply to specific types of copyrighted works and do not apply to software, computer games and digital copies of films.

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HKG Serious About IPR Enforcement

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¶18. (C) The Head of the Intellectual Property Investigation Bureau at Hong Kong's CED, Ben Ho, recently told EconOff that his bureau employs seven full-time officers in its Anti-Internet Piracy Team. That team represents only a fraction of CED teams focused on the non-electronic distribution of counterfeit goods (including pharmaceuticals, handbags, CDs, DVDs and software). Ho described several cases under investigation by the CED. On September 19, the CED arrested a 14-year-old boy suspected of placing 2,000 Chinese-language pop songs on an Internet site for free downloading. On September 4, the CED arrested seven individuals, including the proprietor of a cyber-cafe and two directors of a travel agency, after their companies were found using pirated software. The CED seized 72 computers in its raids. The CED has made arrests in seven corporate piracy cases thus far in 2007, compared with five such cases in all of 2007.

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